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IN THE

Supreme Court of the United States

October Term, 1970

No. 1155

TRI-SERVICE DRILLING COMPANY,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent,

consolidated with:

BRAHANEY DRILLING COMPANY,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THORNTON HARDIE, JR.
BROOKS L. HARMAN
TURPIN, SMITH, DYER,
HARDIE & HARMAN
1010 American Bank of
Commerce Building
Odessa, Texas 79760
COUNSEL FOR PETITIONERS

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The Petitioners pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above cases on October 6, 1970, and that they be considered in conjunction with the case of Rod Ric Corporation vs. National Labor Relations Board in the Fifth Circuit

wherein a Writ of Certiorari as applied for on October 10, 1970, Docket No. 822, and the case of *Morton Oil Producing and Drilling Corporation* vs. *National Labor Relations Board*, F 2d (1970) for which a Writ will shortly be applied for out of the Tenth Circuit Court of Appeals.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit enforcing the Board's order is reported at F 2d . A Stay of Mandate was granted to and including December 23, 1970 on November 24, 1970.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on October 6, 1970 and a copy thereof is appended to this Petition in the Appendix at pp. 36 to 37. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The NLRB conducted union elections in connection with Petitioners' businesses and by orders of its Regional Director, pursuant to a prior order of the Board in *Hondo Drilling Company, N.S.L.*, (164 NLRB #67, May 8, 1967), allowed non-employees to vote. The elections were held subject to a special reservation by Petitioners and the Board whereby employers were given the right to contest the voter eligibility after the election through:

(1) Objections to the election,

(2) Section 8(a) (5) procedures, or

(3) Otherwise.

Both companies timely filed objections concerning eligibility of voters and requested a hearing on same. The Board overruled the objections and denied both companies hearings on the objections and certified the results of the election. Both companies refused to bargain and the Board filed a refusal to bargain complaint against each. Thereafter a hearing was held by a Trial Examiner on the issue of voter eligibility pursuant to the stipulation. The Trial Examiner applied the Board's ruling in *Hondo Drilling Company, N.S.L., supra*, and *Carl B. King Drilling Company*, 164 NLRB #68, and the Board sustained the Trial Examiner's decision. The Board then sought enforcement in the U. S. Fifth Circuit Court of Appeals. The Court enforced the Board's order. The questions presented are:

(1) Does the NLRB have the power to force a union on employees by the expedient method of making non-employees eligible to vote, permitting non-employees to vote, and to deny employers the right to challenge such non-employee voters?

(2) Is the NLRB required to follow the rule-making procedure of the Administrative Procedure Act when it establishes a voting

eligibility rule for an entire industry in the Permian Basin, contrary to its usual rules of voter eligibility.

(3) Do the foregoing acts of the NLRB and the Fifth Circuit Court of Appeals in sustaining the NLRB, deny Petitioners and their employees their rights under the National Labor Relations Act, and/or deny them the protection of due process of law guaranteed them by the Fifth Amendment to the Constitution of the United States, and the Administrative Procedure Act?

STATUTES

The pertinent portions of the Fifth Amendment of the United States' Constitution; Labor Management Relations Act, as amended, 29 U.S.C. 152(3), 157, 159(a) and (b); Administrative Procedure Act (5 U.S.C.A., Section 552(a) (1)(D) and (E); 553 and 554; NLRB Field Manual, Para 11.338 through 11,338.5.

STATEMENT

These cases arose on applications of the NLRB for enforcement of its orders issued against Tri-Service Drilling Company and Brahaney Drilling Company, Petitioners herein, pursuant to Section 10(e) of the Labor Management Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq).

The NLRB, on the basis of the employment circumstances of one small drilling contractor in the Permian Basin of West Texas, Hondo Drilling Company N.S.L., fashioned a new eligibility *rule* (emphasis ours) to meet what it claimed were problems of the industry. In the *Carl B. King Drilling Company* case it called it a "new eligibility rule". (*Carl B. King Drilling Company*, 164 NLRB No. 68) The new eligibility rule is as follows:

> "All roughnecks who have been employed by employer for a minimum of ten (10) working days during the ninety (90) calendar day period preceding the issuance of our decision and direction of election herein, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed, as well as all roughnecks whose names appear on employer's payroll list immediately preceding the issuance of the Regional Director's notice of election." *Hondo Drilling Company N.S.L.*, 164 NLRB No. 67 (1967)

The facts upon which the Board fashioned its rule are as follows:

Hondo operated five drilling rigs, only two or three of which were in operation at any given time. Each rig required nine (9) roughnecks in its day to day operation. Hondo is classified as a "small rig company" because its equipment is capable of drilling only to a depth of 11,000'. The time necessary to complete a

drilling job varies from a minimum time of ten (10) days to a maximum of thirty (30) days and an average of eighteen (18) days. When the particular job has been completed, the rig is "stacked" (taken out of service) until such time as it is needed to be transferred to a new drilling site. When the rig is again placed in operation, it may be stationed at a site many miles distant from its former location and, as a consequence, a sizeable number of the crew members are hired in the general area of the drilling site. Its employees are terminated at the end of each job but enough of its key roughnecks remain available to permit it to provide operating crews for two (2) rigs.

During the period prior to the representation hearing, Hondo employed a total of 224 roughnecks who worked an average of 34 days. Fifty-three of the 224 worked on 2 or more rigs averaging 88 days per man. Seventy-one worked less than 10 days and 104 voluntarily quit their employment before completion of the job on which they were working.

Although Hondo maintains an almost continuous drilling operation, the amount of time spent on a single drilling job is relatively short. All employees who have not been terminated for cause or who have not quit voluntarily before the completion of the particular job are considered eligible for re-employment with Hondo. A significant number of these employees have maintained a continuing interest in employment with Hondo, as is evidenced by the fact that they have accepted re-employment and have worked a substantial number

of days during the year. (*Hondo Drilling Company, supra*)

On the same day the Board handed down its decision in *Carl B. King Drilling Company*, 164 NLRB #68, cited the following facts:

> "King owns and operates four heavy duty oil rigs which have the capability of drilling to a depth of 20,000' The operation of such a rig requires the services of a crew, comprising a driller and four crew members, who are generally referred to as "roughnecks". As operations are carried out on a three shift basis, each rig requires a work force of . . . . 12 roughnecks. . . ."

> "The employer was engaged in continuous drilling operations for the period from July 19, 1965 to July 31 1966, and during this time it averaged 1.81 rigs and a work force of 22 roughnecks. The record shows that under normal conditions a derrick will operate at least 60-70 days at one location and that it may operate for as long as 293 days at one drilling site. At no time during this period did the employer have more than 3 rigs in operation and as a result the maximum number of roughnecks employed at any given time was 36. . . ."

> ". . . . If a roughneck quits or is terminated for cause before the completion of the job, he is not acceptable for re-employment by King. On

the other hand, if a roughneck does stay to the completion of the job and has otherwise performed to the satisfaction of the driller, he is considered eligible for re-employment on the next drilling job. During the period from July 19, 1965, to July 31, 1966, King employed a total of 174 roughnecks. Of this number, 21 were employees who are regularly available for work with King and who worked an average of 201 days per year. Of the remaining 153 roughnecks employed 89% had no prior employment history with King. The average number of days worked by the 174 roughnecks was 44 days, and only 48 roughnecks of the total employee complement worked 44 days or more."

"The employer has a hospitalization and vacation program for its employees. To qualify for hospitalization benefits, a roughneck must work at least 180 days over a 2 year period and accept employment when work is available. To qualify for vacation benefits, a roughneck must accumulate 350 days of accrued time and be continually available for employment with King. Only approximately 12 roughnecks are currently receiving these benefits."

The Board then said:

"For the reasons stated in that decision (*Hondo*), we believe that such a formula is appropriate in the circumstances of this case (*King*)."

The Regional Director for the Sixteenth Region of the NLRB and the Board itself have without exception followed the same rule for all of the drilling companies in the Permian Basin.

Local 826, IUOE, AFL-CIO, filed a Petition for an election in Tri-Service Drilling Company on March 7, 1968 and in Brahaney Drilling Company on February 13, 1968, with the Sixteenth Region of the NLRB. The Regional Director negotiated a stipulation for consent election with both employers and the union. The stipulations both contained the following special proviso:

> "7. Record: The record in this case shall be governed by the appropriate provisions of the Board's rules and regulations and shall include this stipulation. Hearing and notice thereof, direction of election, and the making of findings of fact and conclusions of law by the Board prior to the election are hereby expressly waived; provided, however, that this stipulation for consent is without waiver of or prejudice to the employer's right to contest and litigate through objections to the election, Section 8(a) (5) procedures or otherwise the validity of or applicability of the particular voter eligibility rule followed by the Regional Director for the employees of this employer in this election, pursuant to direction of the National Board in Hondo Drilling Company N.S.L., 164 NLRB #67, and Carl B. King Drilling Co., 164 NLRB #68." (Tri-Service App. 118; Brahaney App. 104)

The Board conducted elections in April, 1968 and permitted "Hondo" type voters to vote. The Board certified the union won both elections. In both elections, persons whom the employers contended were not employees were permitted to vote and the companies' observers were not permitted to challenge the votes. (Tri-Service App. 104; Brahaney App. 109)

Tri-Service Operating Experience:

Tri-Service operated the equivalent of 3.8 rigs per day. Each rig required 12 roughnecks in daily operation. Tri-Service is classified as a medium rig company drilling wells ranging from a minimum depth of 5,000' to a maximum of 20,000'. In the 12 months prior to the election, the time spent in drilling a well varied from a minimum of 10 days to a maximum of 156 days with only one well requiring fewer than 20 days. During that year the following table reflects the statistical operating information as follows:

Rig No.	*Number of Wells Drilled*	*Total Days Drilling*	*Average No. days per well*	*Location*
2	3	80	26+	Glasscock County, Texas
3	7	289	40+	Lea County, New Mexico
4	7	140	20	Reagan County, Texas
6	4	343	85 3/4	Gaines County, Texas/ Lea County, New Mexico (adjoining counties)
7	3	332	110 2/3	Reeves County, Texas
8	3	210	70	Reeves County, Texas/ Lea County, New Mexico (adjoining counties)
5	1	63	63	Reeves County, Texas

Glasscock and Reagan Counties are adjoining counties. Gains County, Texas and Lea County, New Mexi-

co are adjoining counties, as are Reeves and Lea Counties.

Either Rig #2 or Rig #4, operating in adjoining counties, was operating almost continuously from April 12, 1967 through 1968, with an overlap where both rigs were operating of only 28 days.

Rig #5 operated in Lea County, New Mexico from May 5, 1967 through July 6, 1967, and then Rig #8 began operating in adjoining county (Reeves) in Texas on July 25, 1967 and operated through March 1, 1968 in Reeves and Lea County, New Mexico, for a total of 210 days or an aggregate of 273 drilling days.

The average number of days for drilling a well for the entire company was 59 for the year. When a well is completed, the rigs are not stacked except occasionally. The rigs stay in the same general locality at all times. The employees are not terminated at the end of each job but are placed in laid-off status until the rig starts up again or the man can be moved to another rig. (Tri-Service App. 72)

During the period the company had an average daily need of 48 roughnecks. It employed 30 who worked more than 200 days for an average of 271 days. 54 roughnecks worked in excess of 100 days.

38 roughnecks participated in the company's hospitalization program which requires 6 months employment for eligibility. 22 roughnecks qualified for vacation which requires one year of employment with the company (Tri-Service App. 81).

Brahaney Operating Experience:

Brahaney operated five drilling rigs, Nos. 1, 2, 3, 4, and 6. It drilled wells in the intermediate phase of production, i.e., 9,000' to 13,500'. During the 10-month period preceding the election and ending on February 29, 1968 Brahaney operated the equivalent of 2 rigs on an almost continuous basis. It had a need of 24 roughnecks daily. The time for drilling a well varied from 36 days to 80 days with an average of 51 days per well. It does not terminate its crews at the end of a well, but attempts to keep its crews available from job to job. (Brahaney App. 34) Rig No. 1 only worked in Yoakum County; Rig No. 2 only worked in Midland County; Rig No. 3 worked in Martin, Andrews, and Yoakum Counties, all within a radius of 50 miles of Andrews, Andrews County, Texas; Rig No. 4 worked only in Midland and Ector Counties, adjoining counties; and Rig No. 6 only worked in Upton County and started a well in Midland County which adjoins Upton County. The following is the rig activity of Brahaney's rigs from May 1, 1967 through February 29, 1968:

Rig No.	*Number of Wells Drilled*	*Total Days Drilling*	*Average No. days per well*	*Location*
1	2 (plus 1 in progress 19 days)	126	53 1/2	Yoakum County, Texas
2	4	157	39	Midland County
3	3	163	54	Martin, Andrews & Yoakum Counties, Texas
4	2	126	63	Midland & Ector Counties
6	1	57	57	Upton County (Brahaney App. 118)

Midland, Andrews and Ector are adjoining counties. Upton is adjacent to both Midland and Ector Counties. Martin County joins Andrews and Midland Counties. Yoakum County is about 45 miles north of Andrews County.

20 roughnecks worked more than 100 days in 1967 (Brahaney App. 117).

Both companies filed objections to the election on the grounds of illegal voters voting and sought a hearing on the matter prior to certification. In both instances the Regional Director certified the results of the election without a hearing. (Tri-Service App. 128-147; Brahaney App. 107-114)

Subsequently, the Board filed a complaint against each company alleging unfair labor practice for refusing to bargain. Each Petitioner herein filed answers and a hearing was held. The Trial Examiner, in both cases, held that operation and employment patterns of both companies had no significant differences from the operations and patterns of employment set forth by the Board in the *Hondo* and *King* cases. (Tri-Service App. 13; Brahaney App. 9) The same Trial Examiner heard both cases. The Board sustained its Trial Examiner in both cases. (Tri-Service App. 19-21; Brahaney App. 14)

REASONS FOR GRANTING THE WRIT

1. The decision below should be reviewed because the rights of employees concerning their wages, hours and other working conditions are being denied or other-

wise jeopardized by the NLRB which allowed non-employees to vote in an election to determine if the union should be the employees' bargaining representative, and the Court below erroneously extended the meaning of Section 9(c) of the Labor Management Relations Act (hereinafter called "The Act") and erroneously interpreted its power and responsibility for judicial review of the action of the NLRB in its decision to enforce the order requiring these employers to bargain with the union.

Making non-employees eligible to vote dilutes the voting rights of the regular employees and thereby decreases the voting power of the employees. It violates the "one man one vote" philosophy. By allowing a person to vote who works only 10 days in 90 permits the union to have a small cadre of members to go from one company to another, work 10 days to completion of a well at each company, vote in each company's election, and thereby swing the election for the union. Thus, under such circumstances, the union could be the bargaining agent in many companies and not actually represent a majority of the employees in any company. The interests in working conditions of regular or permanent type employees are greatly different from the intermittent or one-time employee. The one wants long range benefits, such as vacations, hospital and medical insurance, etc.; while the other wants immediate wages and immediate benefits. This conflict should be resolved in favor of permanent-type employees, otherwise the purposes of the Act will be defeated. This will not lead to industrial harmony but to industrial strife.

Given the turnover reflected in the record in these cases, it should be easy to see, within a very short period of time few persons who voted in the election would still be employed. Yet, the union would still be the bargaining agent for the employees of the company even though such employees did not vote for the union. At the present time, it is highly unlikely that more than 1/3 of the voters in each of these cases are still working for the respective company since the election was held 32 months ago. (April of 1968)

Section 9(c) of the Act only authorizes the Board to determine whether a question of representation exists, to determine the proper unit for bargaining, and to direct an election. In this case the Board determined the proper unit for bargaining was:

> "All derrickmen, motormen, and floorhands, otherwise referred to as roughnecks, employed by the employer in drilling operations in the area generally known as the Permian Basin, excluding all toolpushers, drillers, office employees, technical employees, guards, professional employees, and all supervisors as defined in the Act." (Tri-Service App. 150; Brahaney App. 114)

Petitioners have found no fault with the appropriate unit or that an election should have been directed. The fault they find is in the determination that former employees are eligible to vote and determine the rights with respect to working conditions of the actual employees of the company.

The Court below indicated if the Board had abused its discretion in determining who were eligible to vote, it might have overturned or refused to enforce the Board's order. It is submitted the Board did abuse its discretion and the Court below failed to consider the facts in the cases before it and their application and comparison with the *Hondo* case. Further the Court below misinterpreted the facts in the instant cases and consequently apparently did not understand the significance of the facts involved. This is pointed up graphically when the Court said:

> "Both companies would distinguish themselves from *Hondo* company on the ground that it was characterized as a 'small-rig' company while they utilized longer drills."

There is nothing in the record about the length of drills. All of the drills are the same size. The difference between a small rig and a big rig is the depth to which they drill oil wells and consequently the length of time it takes to drill them and the employment possibilities. This is most significant because the Fifth Circuit in *Hondo Drilling Company* case, 428 F.2d 943, said:

> "The *Hondo* rule is merely the eligibility formula devised for the Hondo election; it does not purport to be an inviolate standard to regulate future situations. The fact that the same formula may have been employed in other elections is not controlling."

When the NLRB, without exception, applies the same formula to every single election held in the oilfields

of the Permian Basin and that fact is brought to the attention of the Court, the Court is deliberately ignoring the obvious. It is perfectly clear from a reading of the Board's own decision in *King*, supra, the NLRB intended to and would apply the *Hondo* formula in the oil well drilling industry without deviation when it said:

> "We have recently considered the employment patterns in the oil well drilling industry in a case (Hondo) very similar to the one now before us, and we found it necessary to resolve the question of voter eligibility by fashioning a new eligibility *rule* (emphasis added) to meet the problems of this industry. For the reasons stated in that decision, we believe that such a formula is also appropriate in the circumstances of this case."

The Trial Examiner followed the *Hondo* and *King* decisions in the Tri-Service and Brahaney cases. The "Statement of Facts", above, clearly shows there are variations of considerable importance in determining whether or not these people had a continuing interest in the working conditions of these employers.

Apparently the Board used the 10-day requirement because the minimum time required to drill a well by Hondo was 10 days and Hondo terminated its employees at the end of each well. If the Board is going to follow that theory, it should have said that the requirement will be the minimum number of days required by the company to drill a well during the pre-

ceding period of time. In Brahaney's case that was 36 days and in Tri-Service's case it should be 20 because that was the minimum number of days except for one isolated situation requiring 10 days. Neither of these companies discharges or terminates employees at the end of each well as was done in Hondo. Some drilling companies, drilling only gas wells in the Delaware Basin of the Permian Basin, have a minimum drilling time of 12 to 18 months. Yet, the 10 day rule would still apply. This is an absurdity. The mere fact the Board's rule permitted non-employees to vote tainted the entire election with illegality. This is a fundamental principle, whether or not the votes could or could not affect the final tally.

2. The lower Court erred in holding the Board did not adopt a rule in violation of the Administrative Procedure Act when it fashioned a formula in the Hondo case. (*NLRB vs. Hondo Drilling Company*, 5th Cir., 1970, No. 27943, June 16, 1970). The Board itself called the formula a "rule" in *King Drilling Company* case, *supra*. The Board and the lower Court chose to ignore the complete differences between the employment practices in Petitioners herein and the *Hondo* and *King* drilling company cases. The Board applied the Hondo formula in the following cases, in addition to these two cases, as well as others, even though some of the named companies had only deep well rigs, some only intermediate rigs, some small rigs, and some combination rigs:

Chaparral Drilling Company
NLRB Case #16-RC-5178;

Falcon Seaboard Drilling Company
NLRB Case #16-RC-4573;
Highland Drilling Company
NLRB Case #16-RC-4387;
Hillin Drilling Company
NLRB Case #16-RC-4875;
Hondo Drilling Company N.S.L.
NLRB Case #16-RC-4369;
Carl B. King Drilling Company
NLRB Case #16-RC-4367;
Leatherwood Drilling Company
NLRB Case #16-RC-5051;
Lowe Drilling Company, Inc.
NLRB Case #16-RC-4341;
Moran Oil Producing and Drilling Corporation
NLRB Case #16-RC-4575;
Ray Morris Drilling Company
NLRB Case #16-RC-4583;
Parker Drilling Company
NLRB Case #16-RC-4455;
Rod Ric Corporation
NLRB Case #16-RC-4398;
Sharp Drilling Company and Midland Exploration Company
NLRB Case #16-RC-4340;
W E K Drilling Company
NLRB Case #28-RC-1692.

If the Board had not fashioned a rule of eligibility for the entire drilling industry, as stated in the *King Drilling Company case*, then under the facts of these cases an entirely different rule would apply. It is submitted, when the Board establishes a rule of general applica-

bility, it must follow the Administrative Procedure Act.

3. The decision below has clearly failed to consider the constitutional rights of the actual employees of these two petitioners. It is the rights of employees under the Act that are to be protected. The right of a person to contract with respect to his employment is a property right protected under the Fifth Amendment to the Constitution of the United States. This right has been limited by the Labor Management Relations Act, but it has not been destroyed by such Act. However, in these cases, the Board, with the concurrence of the Court below, would destroy entirely the rights of actual employees of Petitioners by permitting persons who are no longer employed by Petitioners, who have no expectancy of future employment, and who have no continuing interest in the working conditions of Petitioners, to determine whether or not the actual employees are to be represented by a union and to negotiate a contract for them. Under the facts shown, if the election is allowed, it is almost certain the union will negotiate a contract for employees it does not now represent and probably never represented. Wherein is there any limitation upon the power of the Board to permit non-employees to vote?

It has been nearly three years since the election. Surely, under the circumstances, it would not serve the purposes of the Act to require the present employees to be represented by Local 826 without a new election and one limited to those employees who have a continuing interest in the working conditions of Pe-

titioners. Furthermore, even after such an election, the union should be required to prove its majority representation annually.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Thornton Hardie, Jr.

Brooks L. Harman
TURPIN, SMITH, DYER,
HARDIE & HARMAN,
1010 American Bank of
Commerce Building
Odessa, Texas 79760

ATTORNEYS FOR
PETITIONERS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies each of Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the herein styled case was mailed to each of the following on the day of December, A.D., 1970:

Solicitor General of the
United States
Department of Justice
Washington, D. C. 20530

Honorable Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board
Washington, D. C. 20570

Thornton Hardie, Jr.
One of the attorneys for Petitioners

Turpin, Smith, Dyer,
Hardie & Harman
1010 A. B. C. Building
Odessa, Texas 79760

APPENDIX

A. FIFTH AMENDMENT TO UNITED STATES CONSTITUTION

No persons shall .... be deprived of life, liberty, or property, without due process of law, ...

B. LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED (29 U.S.C., 152, 157, 159, 160, ET SEQ.)

§ 152. Definitions

When used in this subchapter —

...

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor,

or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

. . .

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452, June 23, 1947, c. 120, Title 1, § 101, 61 Stat. 140.

. . .

§ 159. Representatives and elections — Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employes in such unit for the purposes of collective

bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: ....

Determination of bargaining unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: ....

C. ADMINISTRATIVE PROCEDURE ACT, (5 U.S.C.A. Sections 552(a) (1), (D) and (E); 553; and 554)

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public —

...

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of

general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversly affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

...

§ 553. Rule making

...

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include —

(1) a statement of the time, place, and nature of public rule-making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.

...

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved —

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of —

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceedings shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for —

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals

of adjustment when time, the nature of the proceedings, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This sub-section does not apply —

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate controversy or remove uncertainty. Pub.L. 89-554, Sept. 6 1966. 8 Stat. 384.

...

D. NATIONAL LABOR RELATIONS BOARD FIELD MANUAL PARA. 11,338

...

11338 Challenges: The challenge procedure provides a method whereby a voter's eligibility to vote may be called into question, the ruling on the question may be at least temporarily reserved, and the questioned voter may memorialize his desires in the event his desires should have relevance in the future — all without disrupting the regular flow of votes.

Any observer has the right to challenge a voter for cause. The Board agent must challenge anyone whose

name is not on the eligibility list. Also, he must challenge a voter if he knows or has reason to believe that the voter is ineligible to vote, but in this instance, he should not challenge until and unless none of the parties voices a challenge. The Board Agent will not make challenges on behalf of the parties, whether or not such parties have observers present.

The reasons for the challenge should be stated at the time the challenge is made.

11338.1 Challenge procedure: When a voter is challenged, a small "c" is placed beside his name by the checking observers. (If his name does not appear on the list, it should be added, in a supplemental list, and the "c" inserted.) The Board agent (at the checking table or, in a large election, at a challenge table) fills out the information called for on the stub of a challenged ballot envelope — the voter's name, clock number, job classification, employer, place and date of election, the reason given for the challenge, the identity of the challenger and his (the agent's) initials. If time permits, he may elicit specific information surrounding the voter's status, for insertion on the reverse side of the stub, there to be initialed by the voter.

The voter is then given a ballot and instructed to enter the booth, mark the ballot, fold it so as to keep the mark secret and return to the voting table. Upon his return to the voting table, he is given a challenged ballot envelope. The *voter* places the marked ballot in the envelope, seals the envelope, and drops it in

the box. Observers stationed at the voting booth area and/or the ballot box should make sure that the challenged voter, when he comes out of the booth, goes to the voting table and does not drop the ballot in the box before placing it in the envelope, and *sealing* the envelope.

11338.2 Notation of potential challenges: Observers may maintain lists of persons they intend to challenge, but the better practice is to permit the parties to note on the eligibility list, at the preelection check, the persons they intend to challenge. Any such marks made prior to an election, however, must be easily distinguishable from the marks to be made by observers at the election.

11338.3 Proper time to challenge: Challenges should be handled as they come up. Challenged voters should not be told to return later, and they should not be allowed to congregate in the polling place awaiting a slack period.

In the oral instructions to observers, they should be urged to challenge as the voter comes up to the checking table. Normally, a challenge should be made before the questioned voter receives a ballot.

11338.4 Merit of challenge should not be argued: Arguments on the merits of a challenge should not be permitted. The challenge steps outlined above should be taken quietly and quickly, and the regular voting flow should be impeded as little as possible. The Board agent should be prepared to explain to the voter, quick-

ly and lucidly, the measures which will be taken to protect the secrecy of the challenged ballot.

11338.5 Exclusions in decision: Persons in job classifications specifically excluded by the Decision and Direction of Election should be refused a ballot, even under challenge. The Board agent must exercise discretion in deciding whether to allow a vote (under challenge) when the person presents plausible reasons for being permitted to vote despite the exclusion, or if his actually being within the excluded group is not without question.

. . .

E. STAY OF MANDATE, JUDGMENT, AND DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK
EDWARD W. WADSWORTH
Clerk

Room 408 — 400 Royal St.
New Orleans, La. 70130
November 24, 1970

Mr. Joseph Connally
Attorney at Law
1010 ABC Building
Odessa, Texas 79760

RE: No. 29076 & 29336 — NLRB vs.
Brahaney Drilling Company
Mandate Stayed to 12/23/70.

Dear Sir:

The Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this Court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore, will not be routinely prepared by this office. 38 LW 3502.

Enclosed is a copy of the opinion, judgment and which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

(Signed) G. F. GANUCHEAU
G. F. Ganucheau
Chief Deputy Clerk

ra
enc
cc: Mr. Marcel Mallet-Prevost
Mr. Elmer P. Davis

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
versus No. 29076

TRI SERVICE DRILLING COMPANY,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
versus No. 29336

BRAHANEY DRILLING COMPANY,
Respondent.

Filed: Oct. 28, 1970

JUDGMENT

Before: Bell, Ainsworth and Godbold, Circuit Judges.

The above-consolidated causes came on to be heard upon applications of the National Labor Relations Board for the enforcement of its Orders issued by it against Respondent, Tri-Service Drilling Company, its officers, agents, successors, and assigns, and Respondent, Brahaney Drilling Company, its officers, agents, successors, and assigns both on June 2, 1969. The Court having carefully considered the briefs and transcript of record filed in this cause determined the cases appropriate for summary disposition without oral argument. On October 6, 1970, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Orders.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said Orders of the National Labor Relations Board in said proceeding be enforced; and that the above-named Respondents, their officers, agents, successors, and assigns abide by and perform the directions of the Board in said orders contained.

ENTERED: OCT. 28, 1970

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29076
Summary Calendar*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

TRI-SERVICE DRILLING COMPANY,
Respondent.

Consolidated With
No. 29336
Summary Calendar*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

BRAHANEY DRILLING COMPANY,
Respondent.

Applications for Enforcement of Orders of the National Labor Relations Board (Texas Case)

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*Rule 18, 5th Cir.; *See* Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir., 1970, ——— F.2d ———, Part I [No. 29278, August 14, 1970].

(October 6, 1970)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

GODBOLD, Circuit Judge: These cases followed a parallel course before the Board[1] and have arrived in this court almost simultaneously. Because of the similarity of the issues raised, we direct that they be consolidated. We enforce the Board orders.

Both companies refused to bargain with the Operating Engineers' Local 826, which was approved in representation elections ordered by the Board for each company. Each had reserved by stipulation with the Board in the pre-election proceedings the issue of the eligibility of workers to vote in the elections.[2] The Board found in each case that the formula it had applied in *Hondo Drilling Co.*, 164 NLRB 416 (1967), *enforced*, ___ F.2d ___ [No. 27934, 5th Cir., June 16, 1970], and *Carl B. King Drilling Co.*, 164 NLRB 419 (1967), was applicable here also. It therefore held the challenges of both companies to be unfounded and held both to have violated Sections 8(a) (5) and (1) by their refusal to bargain.

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[1] *Brahaney* was 176 NLRB ____ (1969), and *Tri-Service* 176 NLRB ____ (1969). Both were decided the same day on appeal from the same trial examiner.

[2] This distinguishes the similar recent case of NLRB v. Rod-Ric Corp., ____ F.2d ____, [No. 27942, 5th Cir., June 16, 1970], where the company was foreclosed on an application by the Board for enforcement, from raising the issues raised here for failure to except to the original eligibility determination.

Both companies operate in the Permian Basin area of west Texas and eastern New Mexico. Both operate drilling rigs which require the services of a driller (supervisor) and four roughnecks on each crew. The driller is responsible for hiring and firing his own crew members. Operation of the rigs at any one site lasts only a matter of days or weeks, running twenty-four hours a day, seven days a week. Because of the arduous work and the relatively short duration of any one operation, the employment pattern in both companies is markedly unstable. Many men quit to find work nearer home or of longer duration or to rest. Some are bumped by men with more seniority. And many find it necessary to move to other companies after the completion of a job because of unavailability of nearby employment with their current employer. Many may be rehired by their current company, in some cases several times.

Tri-Service drills wells within a radius of about 150 miles from its headquarters in Midland, Texas. It owns seven rigs and drills to depths of between 5,000 and 20,000 feet. For a sample period of one year, Tri-Service's operations lasted for ten days on the well site and ranged up to 178 days on the longest job, the average being 59.5 days. The seven rigs operated by Tri-Service, in three shifts, would require 84 roughnecks if operating at once. During the sample year, an average of only four rigs were operating at any one time.

The company employed 384 roughnecks in all over the sample period.[3]

In order to encourage a steadier employment relationship with roughnecks, Tri-Service offered a one-week paid vacation for employees who remained with the company for more than a year, and contributed to an insurance program for continuous employees of more than six months. Exceptions were worked out to allow for participation in both programs despite necessary breaks in employment. Twenty-two men qualified for vacations and 38 for insurance contributions during the sample year.

Brahaney owns and operates five rigs out of Midland, drilling wells 9,000-13,500 feet deep, and averaging 56 days per well over a sample two-year period. Over these two years an average of 2.08 rigs were drilling at any one time. Brahaney employed a total of 228 roughnecks during 1967 who averaged 32 days in the company's employ.[4]

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[3]The breakdown of these employees by duration of employment is:

	Tri-Service
Employees working 301 days and over	17
Employees working 201 to 300 days	13
Employees working 101 to 200 days	24
Employees working 51 to 100 days	19
Employees working 26 to 50 days	50
Employees working 11 to 25 days	67
Employees working 1 day to 10 days	194
Total	384

[4]Time worked for Brahaney per employee between April 1, 1967 and March 31, 1968 was:

Employees working 301 days and over	0
Employees working 201 days to 300 days	9
Employees working 101 days to 200 days	11

In both cases the Board applied the formula first applied in *Hondo* and *King*, which makes eligible to vote in a representation election

> all roughnecks who have been employed by the Employer for a minimum of 10 working days during the 90-calendar-day period preceding the issuance of our Decision and Direction of Election herein, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed, as well as all roughnecks whose names appear on the Employer's payroll list immediately preceding the issuance of the Regional Director's Notice of Election in this proceeding.

164 NLRB at . This court approved the formula with respect to Hondo in enforcing the Board's order, ___ F.2d ___ [No. 27934, pp. 6-7 slip opinion]. The respondents urge us to deny enforcement on the grounds that the *Hondo* formula is invalid because it represents an administrative "rule" promulgated in violation of the rule making procedures of the National Labor Relations Act, 29 U.S.C. § 156, and the Administrative Procedure Act, 5 U.S.C. §§ 551, 553, and that, if valid, the formula is inapplicable to the facts of their cases.

Employees working 51 days to 100 days	23
Employees working 26 days to 50 days	26
Employees working 11 days to 25 days	49
Employes working 1 day to 10 days	86
Total	204

This court already has held that the Board did not violate the Administrative Procedure Act in promulgating the *Hondo* formula. *Hondo*, *supra*, ____ F. 2d ____ [pp. 7-10 slip opinion]. Moreover, respondents were afforded an opportunity before the trial examiner to demonstrate that the application of the *Hondo* formula would be inappropriate in their respective cases. *See NLRB v. Seven-Up Bottling Co.*, 344 U. S. 344, 349, 97 L. Ed. 377, 383 (1953).

Turning to the issue of application, the companies urge that an indeterminate number of employees eligible under the *Hondo* formula are in fact unworthy to vote because they are "drifters" who have no genuine interest in the employer's employment practices. But *Hondo* explicitly excludes from eligibility those employees who quit prior to completion of a well or are terminated for cause. And the companies' policy is to consider any past employee for new work. These same considerations were present when, in *Hondo*, this court approved the Board's use of the formula.

Both companies would distinguish themselves from Hondo Company on the ground that it was characterized as a "small-rig" company while they utilize longer drills. The crux of their argument is that they offer opportunities for longer sustained employment than Hondo, that some of their employees take advantage of this possibility, and that to make short-term employees eligible to vote is unfair to those who have a more consistent relationship of employment with the company. In comparison with Hondo itself, this argument has some slight merit with respect to Tri-Serv-

ice.[5] But Tri-Service's employment patterns do not appear significantly different or more stable than those in *King*, the companion case to *Hondo*.

Moreover, the decision whether to apply the *Hondo* formula to these companies, like other matters of voter eligibility, is within the sound discretion of the Board. *See N.L.R.B. v. Bar-Brook Mfg. Co.*, 220 F.2d 832 (5th Cir. 1955) (seasonal workers). Considering the frequent reemployment of roughnecks, indeed the mutual expectations of employer and roughnecks that former employees with a continuing interest in the company may be rehired, we find no abuse of that discretion. The Board's cut-off point for determining how much relative stability in employment is required to create a statutory employee in any particular case will not be disturbed absent such a showing.

Since the Board did not abuse its discretion in finding that the *Hondo* formula is applicable to the operations of both respondents, the Board's orders will be ENFORCED.

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[5]It has little merit with respect to Brahaney. *Compare* the figures in fn. 5, *supra*, *with* the figures in fn. 4, *supra*. The average period of employment for each Brahaney employee in 1967, while obviously an incomplete indicator of the stability of any company's work force, was almost identical to the sample year average for Hondo (32 and 34 respectively).